

Beverly Enterprises, Inc. t/a Cumberland Nursing & Convalescent Center and Retail Store Employees Union, Local 692, United Food and Commercial Workers International Union, AFL-CIO, CLC

Cumberland Nursing & Convalescent Center and Retail Store Employees Union, Local 692, United Food and Commercial Workers International Union, AFL-CIO, CLC and Beverly Enterprises, Inc. t/a Cumberland Nursing & Convalescent Center, Party in Interest. Cases 5-CA-12858, 5-CA-12982, and 5-CA-13030

August 16, 1982

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND
ZIMMERMAN

On September 30, 1981, Administrative Law Judge James T. Youngblood issued the attached Decision in this proceeding. Thereafter, the General Counsel and Respondent Beverly Enterprises, Inc., filed exceptions and supporting briefs, and each filed a brief in opposition to the other's exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,¹ and conclusions² of the Administrative Law Judge and to adopt his recommended Order.³

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondents, Cumberland

Nursing & Convalescent Center, and Beverly Enterprises, Inc. t/a Cumberland Nursing & Convalescent Center, Cumberland, Maryland, their officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

DECISION

STATEMENT OF THE CASE

JAMES T. YOUNGBLOOD, Administrative Law Judge: A hearing on the complaints herein, alleging violations of Section 8(a)(1) and (3) of the National Labor Relations Act, as amended, was held in Cumberland, Maryland, on June 8 and 9, 1981. Respondents denied the commission of any unfair labor practices. All parties were represented at the hearing and post-trial briefs were filed by the General Counsel and Respondents which have been duly considered.

Upon the entire record in this matter, and from my observation of the witnesses and their demeanor, and after due consideration of the briefs filed herein, I hereby make the following:

FINDINGS OF FACT AND CONCLUSIONS¹

I. THE EMPLOYERS INVOLVED

Prior to September 15, 1980, Cumberland Nursing & Convalescent Center (herein Cumberland) was engaged in Cumberland, Maryland, in the operation of a nursing home. On September 15, 1980, Beverly Enterprises, Inc., t/a Cumberland Nursing & Convalescent Center (herein Beverly) purchased the nursing home business operation from Cumberland and continued that operation providing substantially the same service to substantially the same customers, and employing a majority of the employees who were previously employees of Cumberland.² It is admitted, and I find, that Beverly has continued the employing entity and is a successor of Cumberland. It is further admitted, and I find, that Cumberland and Beverly are employers as defined in Section 2(2) of the Act and are engaged in commerce and in operations affecting commerce as defined in Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The complaints allege, and the answers admit, that the Retail Store Employees Union, Local 692, United Food and Commercial Workers International Union, AFL-CIO, CLC (herein the Union), is a labor organization within the meaning of Section 2(5) of the Act.

¹ The General Counsel and Respondent Beverly Enterprises have accepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

² Rejecting her testimony to the contrary, the Administrative Law Judge found that former striker Shelby Nixon was in fact told and indeed understood that she was to report to work on December 8, 1980. Her failure either to report or to notify her employer of her intended absence on that date precipitated her discharge. In this respect, there is no evidence that Nixon was treated more harshly than the other nursing home employees who violated the Respondent's rules concerning unexcused absences. Accordingly, we agree with the Administrative Law Judge that her discharge did not violate Sec. 8(a)(3) and (1) of the Act, as alleged.

³ In accordance with his dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980), Member Jenkins would award interest on the backpay due based on the formula set forth therein.

¹ The facts found herein are a compilation of the credited testimony, the exhibits, and stipulations of fact, viewed in light of logical consistency and inherent probability. Although these findings may not contain or refer to all of the evidence, all has been weighed and considered. To the extent that any testimony or other evidence not mentioned in this Decision might appear to contradict my findings of fact, I have not disregarded that evidence but have rejected it as incredible, lacking in probative weight, surplusage, or irrelevant. Credibility resolutions have been made on the basis of the whole record, including the inherent probabilities of the testimony and the demeanor of the witnesses. Where it may be required I will set forth specific credibility findings.

² Cumberland and Beverly are collectively referred to as Respondent.

III. THE ALLEGED UNFAIR LABOR PRACTICES

On March 11, 1980,³ the National Labor Relations Board, in Case 5-CA-10889, certified the Union as the exclusive collective-bargaining representative of all full-time and regular part-time service and maintenance employees employed by Cumberland at its Cumberland, Maryland, location.⁴

On May 10, certain employees of Cumberland ceased work concertedly and engaged in a strike. Of the approximately 104 employees of Cumberland, 55 went on strike and 48 participated in the strike activities. Picketing took place at two driveway entrances to the nursing home center off Winifred Road in Cumberland, Maryland. On November 20, the Union, by letter, notified Beverly that the employees⁵ engaged in the strike were making an unconditional offer to return to work at the nursing home.

A. *The Alleged Discriminatory Discharge of Clondetta Arbogast*

Arbogast went on strike on May 10. On September 11, she was discharged by Cumberland for alleged picket line misconduct. Following receipt of the Union's November 20 letter, Beverly began contacting the employees to make arrangements for their return to work. Every striking employee except Arbogast was offered reinstatement. When Arbogast failed to hear from Beverly, she contacted Beverly concerning her returning to work without success.

Betty Cook, director of nurses for Beverly, testified that all striking employees except Connie Arbogast were offered reinstatement. She further testified that Connie Arbogast was not offered reinstatement because she had been terminated and therefore were no longer considered an employee. Cook testified that on August 29, when she came to work at 7:30 a.m., Mrs. Dolly Mudge, the night supervisor, informed her that Connie Arbogast had attacked Nancy Dolly. Mudge told her that Nancy Dolly was attempting to drive into the parking lot the evening of August 28, and there was a car parked in the way so that she had to go out of her way to get into the lot. As she was doing this the individuals on the picket line yelled at her and called her bad names, such as "nigger lover." When Dolly got out of her car the individuals on the picket line asked her to come to the picket line. She went to the picket line and informed the picketing employees that she did not appreciate being called those names, and that it was her right to work, and that if she wanted to work she certainly should be able to. She in-

formed them that she was not afraid of them, and when she turned to leave she was attacked by Connie Arbogast who pulled her hair, and actually pulled some of it out by the roots, scratched, and hit her.

Cook said she contacted Dolly and her story coincided with that given by Mrs. Mudge. Cook stated that to her knowledge this was the first incident of picket line violence, but there had been many instances of rock throwing, nails dropped, flat tires, cars being hit, and name calling, but that this was the first incident of bodily harm. Cook stated that Arbogast had been involved in picket line violence before by hitting an employee's car with her fists. Cook said there had been reports that she had done other things, but that she had not been disciplined for any of these. She said that Arbogast was the only employee ever disciplined for picket line violence, and that she was disciplined because she was the only one involved in bodily harm and assaults. Cook testified to other conduct on the part of Arbogast prior to the advent of the Union in an attempt to establish that Arbogast should have been or could have been discharged for cause at any time prior to the strike. And she testified that these facts were in her mind at the time she recommended the discharge of Arbogast.⁶

Cook testified that, after discussing the incident with Nancy Dolly, she contacted Bruce Boyer, the administrator of the nursing home. Cook informed Boyer of what had happened and told him that, in view of the past year and Connie's record which had been very bad, she felt very strongly that Arbogast should be terminated. Cook testified that, although Arbogast was terminated as a result of the picket line incident on August 29, her past record certainly had a bearing on the discharge and that was what she had in mind and that is what she conveyed to Boyer. Cook testified that she was present when Boyer called the company attorney and that, while she did not remember word for word, she was sure that was what Boyer told the attorney. She testified that no discipline was given to Nancy Dolly because Dolly was attacked, and why should she have been disciplined.

Bruce Boyer testified that from September 3, 1972, until October 17, he was the administrator of the nursing home. Boyer testified that around 9:30 a.m., on August 29, Betty Cook informed him of what had transpired on the picket line between Nancy Dolly and Connie Arbogast and that Nancy Dolly had been attacked by Connie Arbogast. He stated that Mrs. Cook recommended that Arbogast be discharged and that he called the attorney,

³ Unless otherwise specified, all dates refer to 1980.

⁴ The appropriate unit is described as follows:

All full-time and regular part-time service and maintenance employees employed by the employer at its Cumberland, Maryland, location, including nurses aides, L.P.N.'s, orderlies, dietary, housekeeping, laundry and maintenance employees, but excluding R.N.'s, office clerical employees, guards and supervisors as defined in the Act.

On August 18, in *Cumberland Nursing & Convalescent Center*, 251 NLRB 290 (1980), the Board found Cumberland in violation of Sec. 8(a)(1) and (5) of the Act. On June 29, 1981, the U.S. Court of Appeals for the Fourth Circuit issued its decision enforcing the Board's Order directing Cumberland to bargain with the Union.

⁵ The letter listed the names of 50 employee strikers.

⁶ The file reflects that on July 23, 1979, Arbogast received a warning involving her presence in the employee lounge twice in several weeks not on scheduled break and, leaving patients unattended; she was informed that next time would result in dismissal. On December 20, 1979, Cook reprimanded Arbogast for language she had placed on a note left in one of the vending machines. On May 28, Arbogast received a warning from Cook regarding her sitting and watching television apparently when she was on duty. The warning indicated that it was a final warning. On April 8, Cook suspended Arbogast for 3 working days beginning April 7, for leaving her floor unattended on April 3. The warning pointed out that she had previously been warned and that future infractions would result in her termination. On May 5, Arbogast received a 1-week suspension for falsification of her timecard on April 29. The warning indicated that future incidents would result in her termination. See Resp. Exhs. 1 through 5.

Berens, and recommended that Connie Arbogast be discharged for that conduct. Boyer said the decision to discharge Arbogast was made by Mrs. Cook and that he merely rubber stamped and passed it on to the attorney for his clearance.

By letter dated September 11, Kelvin C. Berens, counsel for Respondent, informed Arbogast that because of the assault on Nancy Dolly she was being terminated as of September 10. It is clear from this record that no attempt was made by Cumberland to contact Arbogast to get her side of the story prior to her discharge. It is also clear that the letter of termination makes no reference to Arbogast's prior record.

Nancy Lee Dolly testified that she began working at the nursing home in June while the strike was in progress and that she had to cross the picket line to get to work. She said that when she first started working the pickets would just yell at the employees crossing the picket line. She said that she began working a shift from 11 p.m. to 7 a.m., and that after she had worked for a month or so the pickets began calling her "nigger lover" and saying that she had half-breed kids and telling her that while she was working "I have your black nigger out."⁷ She testified that this taunting continued on a fairly regular basis. In testifying to the incident on the picket line in late August, she said that on that particular night she drove her own car, although she normally rode with other people. She testified that when she arrived at the picket line a man and several women would not let her through. She said she had to drive out of their way to keep from hitting one of the women. She said she parked her car, got out, and the pickets continued calling her "nigger lover," and dared her to come down to the picket line. She said she started to go into the nursing home but instead went down to the picket line, and said, "Okay, here I am, what are you going to do now." She said she took some things out of her pockets and laid them on the ground, and told the pickets to come on. She said the pickets did not do anything, so she picked up her things and put them in her pocket and started to turn away, when one of the girls grabbed her hair. She grabbed the woman and in doing this she was scratched across her nose and across her eye, and at this point two men took them apart. She went into the nursing home and called the police. She stated that when the police came she went out to the picket line but she did not recognize the woman who had attacked her. She went back into the nursing home and worked the rest of the night.

The next morning she received a call from Cook who wanted to know what had happened. She related her story to Cook. A couple of weeks later she recognized Arbogast on the picket line.

Clondetta Arbogast testified that she became involved with the Union early in 1979; that she attended union meetings, handed out literature, signed a union card, and got other employees to sign union cards. When the Union went on strike she was one of the striking employees and was also a picket captain. She testified that on the night of August 28, at or around 10:45 p.m., she was

on the picket line in the presence of Shelby Nixon, Nixon's husband, David L. Berg, a union representative, and employees Riva Miller, Virginia Kimes, and Dorothy Welsh. She said she was talking to Berg when Dolly went through the picket line⁸ into the parking lot and parked her car. Dolly got out of her car and started hollering dirty language and then headed toward the picket line. At this point Arbogast said that she left Berg's car and went over near the picket line. She said Dolly kept telling Arbogast to hit her, and called Arbogast "a fucking whore like my mother." Arbogast told Dolly she was not going to hit her and to go on back up to work where she belonged. Dolly emptied her pockets, placed the contents on the ground, and came up swinging. When Dolly came up swinging she merely defended herself. At this point Berg and Loretta Wells broke up the fight, and, in so doing, she fell to the ground. She said that Dolly then went to the nursing home and shortly thereafter the police came to the picket line in the company of Dolly, but Dolly could not identify who had been in the altercation.

Dave L. Berg, Loretta Wells, and Shelby Nixon, with the exception of certain minor discrepancies, corroborated the testimony of Connie Arbogast.

There is no doubt that a strike occurred on May 10, and that pickets were located at two driveway entrances to the nursing center off Winifred Road in Cumberland, Maryland. On November 20, the Union made an unconditional offer of reinstatement on behalf of some 50 employees, including employee Connie Arbogast. Every striking employee was offered reinstatement, except Arbogast. When Arbogast failed to receive an offer of reinstatement, she contacted Beverly and was informed that she was being denied reinstatement because she had been terminated on September 11, because of an altercation with employee Dolly on the picket line.

The General Counsel argues that the discharge of Arbogast was discriminatory in violation of Section 8(a)(1) and (3) of the Act, because Arbogast did not engage in any misconduct on the picket line because she was only defending herself against attack and that, even if the attack were provoked by Arbogast and Arbogast actually swung the first blow, the incident was merely a "trivial rough incident" which did not justify Arbogast's discharge. Respondent on the other hand claims that Arbogast provoked the incident and struck Dolly at the picket line because she was working behind the picket line, and that the discharge of Arbogast was purely for such misconduct on the picket line.

There is no doubt that an incident occurred on the picket line on the night of August 28. And that Connie Arbogast and employee Dolly were involved in that incident. The witnesses for the General Counsel all testify that the first blow was swung by employee Dolly and that Connie Arbogast was merely defending herself. Dolly on the other hand testified that Arbogast grabbed her by the hair and that she in turn grabbed Arbogast by the hair.

⁷ Dolly who is white testified that she has been living with a Black man for 8 years and that they have three children. They are not married.

⁸ At this point in the transcript, the reporter uses the name Polly rather than Dolly the proper name.

It is clear from the testimony of all the witnesses that Dolly had crossed the picket line and was safely in the parking lot, and could have gone in the nursing home without further incident and worked the rest of the evening. However, Dolly chose not to stay safely in the parking lot, but to return to the picket lot. In her own words it appears that she expected trouble because she took the contents from her pockets and laid them on the ground. There does not appear to be much issue about the facts to this point.

The law appears to be well settled that even though employees engage in picket line misconduct they may not be deprived of reinstatement or be discharged for such conduct, absent a showing that such conduct was so violent or of such a serious nature as to render the employee unfit for future services. See *Southern Florida Hotel & Motel Association, etc.*, 245 NLRB 561 (1979). It is also settled that not every impropriety committed in the course of a strike deprives an employee of the protection of the Act. See *Coronet Casuals, Inc.*, 207 NLRB 304 (1973).

Even if employee Dolly's version of the incident is totally credited, Arbogast only grabbed her by the hair, which resulted in a brief scuffle at which point they were pulled apart.

It is my conclusion that Dolly returned to the picket line, from the safety of the parking lot, seeking satisfaction because of obscenities hurled at her by the pickets. It also appears that she struck out at the first picket she ran into, which in this case was Arbogast and Arbogast merely defended herself.

Respondent contends that because of this conduct it discharged Arbogast for picket line misconduct. The only person that Cumberland interviewed who knew anything about the incident was Dolly, who without making any further investigation discharged Arbogast. Cumberland did not even check with Arbogast to get her side of the story. In any event, if I were to accept Dolly's version of the incident, Cumberland did not have sufficient justification for discharging an employee who was otherwise legitimately engaged in peaceful concerted and protected activities. At most, the incident involved only hair pulling, and was therefore an isolated "trivial rough incident," and as far as this record goes was the only such incident committed during the entire strike from May until December.

It appears to me that nurse Cook, having the opportunity to consider Arbogast's past record in view of the changed circumstances, namely, the appearance of the Union on the scene and an actual strike by that Union, and knowing that Arbogast was a active participant in the strike, took the opportunity to rid Cumberland of a thorn in its side. It is my conclusion that the total incident was trivial and did not cause any injury to either party, and did not deter the strike replacements from continuing to work, that the incident was a single isolated incident which was insufficiently serious to deprive an employee caught up in a lawful strike from the protection of the Act. Therefore, this impropriety did not deprive Arbogast of the protection of the Act, and her discharge for engaging in protected concerted activities and union activities on the picket line was violative of Sec-

tion 8(a)(1) and (3) of the Act. There is no doubt that such conduct discourages union membership in violation of Section 8(a)(3) of the Act, and I so find. See *MP Industries, Inc., etc.*, 227 NLRB 1709 (1977), and *Star Meat Company, etc.*, 237 NLRB 908 (1978).

B. The Unlawful Discharge or Failure To Reinstatement Shelby Nixon

As indicated earlier on November 20, the Union made an unconditional offer of reinstatement on behalf of some 50 striking employees, including Connie Arbogast and Shelby Nixon. Thereafter, Beverly began contacting the striking employees to make arrangements concerning their return to work. On December 1, Shelby Nixon was contacted by Christopher Johns, the new administrator, and requested to appear at the nursing home on December 3, for an interview. On December 3, at 11:30 a.m., Nixon met with Johns and Betty Cook in the administrator's office.

According to Nixon, they went over the employee's manual and briefly discussed the rules in the handbook. She testified that Johns did not mention anything about a no-show/no-call policy which would result in discharge. She said that she was told to report for work on December 9, at 7 a.m., and that after the orientation period she would be working on the 3 to 11 p.m. shift. She testified that when she read the rule book she saw the rule dealing with discharge for failure to show up for work or call in, the so-called no-show/no-call policy.

On December 9, she reported for work at or about 6:45 a.m. She had in her possession a signed slip from the employee manual indicating that she had read the handbook, and her doctor's certificate. She offered these to nurse Betty Kirk. Kirk told her to have a seat and, at 7 a.m., she was asked to go into Cook's office. She said that Kirk and Cook were in the office with her, and Kirk told her that her starting date was December 8, and when she responded it was December 9, Kirk said, "I'm sorry, you will have to go home and Mr. Johns will call you."

On cross-examination Nixon said that she reported to work on December 9, and gave her slips to Betty Kirk who told her to have a seat in the lobby. She said that when Cook came in she was asked to go into Cook's office. She testified that Cook told her that her starting date was December 8, and Nixon told Cook that she was positive that it was December 9. Nixon said that Cook told her to go home and wait for a call from Johns. Several days later she received a letter from Johns, dated December 10, informing her that she was terminated as of December 9, because she failed to report to work as scheduled on December 8, and did not contact the nursing home. On the following Monday, she went to the nursing home and asked Johns if he would not reconsider and let her have her job back. He said that he could not do that, that the company had policies which she had to abide by, and it was an unfortunate situation.

Betty Cook testified that all of the employees who made an offer to return to work were offered reinstatement, with the exception of Connie Arbogast. Cook testified that Shelby Nixon was interviewed on December 3,

along with about five other employees. She said they were told of the rules and regulations, and that if they could not come to work on the assigned day that they were to call and if they did not call they would be terminated. She said that Shelby Nixon was scheduled to work on Monday, December 8, and that she did not call or show up that day. She said Nixon reported the next morning, and that she told Nixon that no-call/no-show was cause for termination. Cook testified that Johns had concurred with her decision, and that she told Nixon that she was terminated. She said that, although the decision to terminate Nixon was made on December 8, she talked to Johns again on December 9, and they both remained firm on the decision to terminate Shelby Nixon.

Christopher Johns, the new administrator of the nursing center, testified that he was first employed by Beverly on October 13, and that he was involved in interviewing the striking employees who were offered reinstatement in December. He said that all the interviews were basically the same, that he did most of the talking, that he would identify the individuals and then inform them that they were returning to work unconditionally, and that there were a few things that they should know including the personnel policies of Beverly. He said that each employee was given a mimeographed copy of the manual or employee handbook and that he went over this handbook with them in detail. He said that he specifically emphasized "absence and lateness," and that he told the employees that, if for any reason they could not meet the time in which they were to return to work, they were to notify the nursing home. This was discussed several times with each individual. Each employee was to sign an acceptance sheet that she had read and understood the policies of the nursing home and agreed to abide by them while they were an employee. He testified that Shelby Nixon was interviewed on December 3, and that she was informed that she was to report to work on December 8, and this was made very clear to her. He said that he went over the handbook with her the same as all other employees.

He said that Nixon did not report for work on December 8, and Cook informed him that she did not call or notify the nursing home in any way. He stated that he told Cook that this constituted a violation of the policies, and that Nixon would be terminated. He said that a letter of termination was mailed out and that on the following Monday he had a talk with Nixon. He said that he appreciated her position and, although he was sympathetic to what had happened, he nevertheless was enforcing the company policies and that her termination would stand.

The General Counsel argues that Beverly discriminated against Shelby Nixon by refusing to reinstate her to her former position and terminated her employment because of her membership in and activities on behalf of the Union. Respondent on the other hand contends that Shelby Nixon was terminated simply and solely because she failed to call in and report her absence on December 8, and failed to report to work on December 8. The Respondent contends that her union activities and her membership in the Union had no bearing whatsoever on her termination.

There is no doubt that Shelby Nixon was a member of the Union and that she went out on strike May 10, and stayed out on strike until it terminated in the latter part of November. This fact was obvious to the nursing home, as Shelby Nixon was one of the employees who applied for reinstatement by the Union's letter of November 20. She was interviewed on December 3, and according to Respondent, was told to report to work on December 8. Nixon asserts that she was told to report to work on December 9, and with that in mind she did not show up until December 9, and that her discharge was a total surprise.

Both Cook and Johns testified that Shelby Nixon was informed, on December 3, that she was to report to work on December 8. Cook's testimony reflects that the other employees interviewed on that date were also told to report for work on December 8. Respondent's Exhibit 7 supports the testimony of both Cook and Johns and while this document is certainly self-serving I have no reason to believe that it is not authentic. The document indicates that Shelby Nixon was scheduled to start work on December 8, and that her regular shift would be from 3 to 11 p.m. The record reflects that Nixon did not report for work on December 8, nor did she call in and explain her absence. She did report for work at 6:45 a.m., the following day, December 9.

This record adequately reflects that Shelby Nixon was informed of the employee handbook and that she was aware of the policies and procedures relating to being absent from work without giving the proper notice.

It is clear in my mind that Shelby Nixon was aware that, if she was scheduled to work at the nursing home and was not going to be there, she must call in or contact somebody at the nursing home to explain her absence. This would be a normal function at any nursing home and I am certain is not limited to Beverly.

I have carefully read the testimony of Johns, Cook, Nixon, and other witnesses in an attempt to determine on what day Shelby Nixon was informed that she was to return to work at the nursing home. I recognize that I am dealing with individuals who have some interest in the outcome of these proceedings. With that in mind I have carefully evaluated the testimony of all involved. Christopher Johns appeared to me to be a very reliable witness and his testimony had a ring of truth. His testimony was straightforward and he impressed me as a truthful individual. Both Cook and Nixon were involved in this labor dispute from its inception and their testimony, to some extent, indicates some of the bitterness that was generated by this labor dispute. To the extent that Cook's testimony corroborates that of Johns in this instance, I have accepted her testimony. Therefore, it is my conclusion that Shelby Nixon was informed by Beverly that she was to report for work on December 8, and that she was aware of this fact.

The General Counsel argues that, even though she was scheduled to report on December 8, her failure to return on that date should be excused because she was an unfair labor practice striker. Even assuming that these employees were engaged in an unfair labor practice strike, which fact I do not deem necessary to decide, this

fact in my view does not excuse Nixon's failure to report for work on an agreed-upon time. I agree that an employer cannot establish an arbitrary date and terminate an employee or fail to reinstate an employee who does not report for duty at that precise time. Here Nixon was interviewed on December 3, and told to report for work on December 8. She had an opportunity to raise an objection to this date; however, she did not raise any objections. Additionally, she had at least 5 days in which to make an objection to the date on which she was due to report. She did not call in or indicate to the nursing home that she would not report for work on December 8, as scheduled. Under these circumstances, the fact that Nixon may have been an unfair labor practice striker in my view does not excuse her from reporting to work at an agreed-upon time.

Therefore, as there was an established and agreed-upon time for Nixon to return to work, and she failed to report that day, I see no reason why that cannot be grounds for discharge even assuming that Nixon was engaged in an unfair labor practice strike. There is nothing in this record to indicate that there was any discrimination in regard to the treatment of Nixon as opposed to any other employee at the nursing home. The fact that she was on strike and possibly an unfair labor practice striker does not give her any privileges not afforded all other employees.

In this regard this record clearly shows that employee Carol Redman, a nonstriking employee who was scheduled to work on December 7, and who did not report to work and who did not notify Beverly was terminated because of this in accordance with the terms and conditions of the personnel policies of the Beverly Nursing Home. This record also reflects that Nancy Lee Dolly, the employee who was involved in the incident with Connie Arbogast, was also discharged for the same reason in March 1981. This record also reflects that Loretta Wells, a striking employee, was also terminated in January 1981 for the same reasons. Additionally, another employee, Vicky Chandler, was terminated in December, for the same reasons. Thus, it is clear that there were employees discharged both before and after the discharge of Shelby Nixon for failure to contact the nursing home and inform the nursing home that they would not report to work as scheduled.

Under these circumstances, I cannot find any disparity in the treatment of Nixon. Moreover, there were 50 striking employees who requested reinstatement. All striking employees who wanted to be reinstated were reinstated, except Nixon. There were approximately 34 striking employees reinstated. If this Respondent was seeking a way to punish its employees for supporting the Union, I see no basis in this record why it would choose Nixon over the other 34 properly reinstated striking employees. There is no reason why Respondent would select Nixon as a target for its discrimination.

Under all the circumstances it is my conclusion that Shelby Nixon was scheduled to report for work on December 8, that she failed to report for work that day and also failed to notify Beverly of the fact that she was not going to report, that because of that fact and in accordance with the Beverly policies and procedures she was

terminated. Therefore, it is my conclusion that the General Counsel had failed to establish that the discharge of Shelby Nixon was in any way related to her union activities or other concerted activities, or that she was in any way discriminated against or treated any differently from any other employee and has failed to establish that the Respondent violated Section 8(a)(3) of the Act in this regard. I, therefore, recommend that the complaint be dismissed insofar as it alleges a violation of the Act with regard to termination of Shelby Nixon.

C. The Alleged Unfair Labor Practices as They Relate to Employee Kathy Steckman in Violation of Section 8(a)(1) and (3) of the Act

Kathy Steckman testified that she was first employed by Cumberland on May 23, 1979, and that she left the employment of Beverly on March 6, 1981. She became involved with the Union in the spring of 1979, and she went on strike in May. She returned to work after the strike and prior to returning she was interviewed and was told to report for work on December 10. She testified that, on December 9, she received a call from Cook who informed her to come to work at 8 a.m., rather than 12 noon. During this conversation she asked Cook about extra time and was informed that there would be no extra time. Steckman asked Cook if "scabs" would be working the extra time at the Christmas and New Year holidays. Again Cook said there would be no extra time. Steckman informed Cook that it would be hard for her to report to work at 8 a.m. on December 10 because she was scheduled to have a throat culture that morning. Cook told her to get the throat culture, and when she received the results to call her and they would set up a date for her to come back to work. She ultimately reported to work on December 17, and gave her slip from the doctor, relating to her throat culture, to Head Nurse Betty Kirk. She signed a slip stating that she had read the handbook and was sent down to work with nurse Betty Thomas. At 9:45 a.m., she was called into Johns' office, where she met Johns and Cook. Cook told her to sit down, and advised that the meeting had to do with the telephone conversation the week before when she had used the word "scab." Cook told her that she was not to use that word again and that everyone was going to be treated equal. She stated that Johns told her that he did not want to hear her use the word again and if she did she would be asked to leave immediately. She stated that Cook told her that she had prior knowledge that Steckman had been active in union activities and that she had talked to patients and/or employees about the Union and their activities. Steckman asked if she was blaming the strike on her and Cook responded by stating that she knew that Steckman was one of the main instigators in getting the Union into the nursing home. At this point Johns said, "[W]e have to be careful as to what we say because we could get into a labor dispute."

At 1:45 p.m., she was called into Cook's office, and handed a piece of paper to sign. She read it and refused to sign and Cook told her to go into Johns' office. She told Johns that she did not agree with what was on the paper and would not sign it. She said that Johns said a

word to the wise would be sufficient and that if she was caught doing anything that had to do with the Union she would be asked to leave immediately. She told them they could check with nurse Thomas and she could tell them that she had not talked to anyone about the Union. The warning slip, General Counsel's Exhibit 7, signed by Cook and Johns, was not acknowledged by Steckman but nevertheless was placed in her personnel file.⁹

To the extent that there was any reference to the fact that Steckman had been talking with patients, particularly one Pat Roland, Beverly admits that Roland is not responsible and that the hospital was in error in issuing any warning relating to any conversation that Steckman may have had with Pat Roland dealing with purported union activities. Beverly admitted that it was in error but refused to admit that this was done for discriminatory reasons.

Based on the foregoing testimony of Steckman, which was undenied by both Cook and Johns, it is clear that Steckman was told that Beverly had prior knowledge that Steckman was involved in union activities and that she was one of the main instigators in getting the Union into the nursing home. Steckman was also told that if she was caught doing anything that had to do with the Union in the future she would immediately be asked to leave. These statements clearly create the impression of surveillance of Steckman's activities on behalf of the Union and also constitute unlawful interrogation and threat of discharge, all violative of Section 8(a)(1) of the Act.

Steckman received a warning which related to her discussions with patients concerning the Union which the Respondent admitted was a mistake. The other portion of the warning dealt with Steckman's use of the word "scab" in connection with employees at the nursing home. The use of the word "scab" in the context of the labor dispute has been held by the Board to be protected activity. See *Bandag, Incorporated*, 225 NLRB 72 (1976), and cases cited therein. Accordingly, issuing a warning to Steckman for use of the word "scab," and because of discussions with patients relating to unions and union activities, in connection with prior statements that Respondent knew that Steckman had been involved in union activities, that Steckman was one of the main instigators in getting the Union into the nursing home, and that if Steckman was caught doing anything that had to do with the Union in the future she would immediately be asked to leave, in my view was violative of Section 8(a)(3) of the Act and designed to discourage support for the Union.

As I have concluded that Arbogast was unlawfully discharged by Cumberland prior to the takeover by Beverly

on September 15, 1980, it must be determined whether Beverly is required to offer full reinstatement to Arbogast and whether Beverly is also jointly and severally liable for Arbogast's backpay with Cumberland.

There is no doubt that Beverly is a successor employer in the normal sense. However, employers who acquire and continue to operate the business of the predecessor employer in a basically unchanged form can be held liable for the unremedied unfair labor practices of the predecessor employer under certain circumstances. One of the prerequisites to liability on the part of the successor employer is that it have actual notice of the unfair labor practices of the predecessor. It is unnecessary that unfair labor practice charges be filed prior to the takeover, but the successor employer must have notice of the facts of unfair labor practices at the time it took over the operation.

It is also well settled that the responsibility of establishing that it was without knowledge of the unfair labor practices of Cumberland at the time it took over the Cumberland operation rests squarely with the successor Beverly. See *Mansion House Center Management Corporation, etc.*, 208 NLRB 684, 686 (1974); *Am-Del-Co-Inc., etc.*, 234 NLRB 1040 (1978).

None of the individuals involved in the sales negotiations between Cumberland and Beverly testified at this proceeding. In fact, the only testimony on this point is that of Administrator Bruce Boyer, who testified that he was not involved in the sales negotiations and that he was not contacted by either party to the sale negotiations concerning the strike at Cumberland. Respondent argues that this lack of communication between the participants in the discharge of Arbogast and those parties involved in the sales negotiations establishes the fact that Beverly did not have knowledge of the unfair labor practices.

In my view, Respondent clearly has failed to establish that Beverly was without knowledge of the unfair labor practices of Cumberland at the time it took over the operation of the nursing home. On the contrary, from this record Beverly did have notice of the discharge because the individuals who made the decision to discharge Arbogast, Boyer and Cook, and thereby committed the unfair labor practice, continued to work for Beverly in the same capacity and with the same duties as they had with Cumberland. Moreover, it was admitted by Cook that the only reason Beverly never offered Arbogast reinstatement in December, at the time it offered reinstatement to all other striking employees, was because of Arbogast's discharge in September.

Under these circumstances, it is my conclusion that Beverly is a successor with full knowledge of the facts and events surrounding the unfair labor practices committed by Cumberland in the discharge of Arbogast in September. Therefore, it is my conclusion that, as such, Beverly is jointly and severally liable with Cumberland for Arbogast's backpay and is required to offer her immediate and full reinstatement to her former or substantially equivalent position. See *Bellingham Frozen Foods, etc.*, 237 NLRB 1450 (1978); *Southeastern Envelope Co., Inc.*, 206 NLRB 933 (1973); *Ashville-Whitney Nursing Home, etc.*, 188 NLRB 235 (1977).

⁹ G.C. Exh. 7 reads as follows:

In regards to your phone conversation with Betty Cook on Tuesday, December, 1980, the word "scab" was used to describe the employees here. You will hereby never refer to any employee in this facility by that term again while on duty.

The next item has to do with the patients. We are here to serve the patient and see that they are protected at all times, therefore, any discussion about the union while on duty with any patient will not be permitted. There was a report from a patient that such a discussion had taken place. If any such reports are heard in the future, this will result in your possible immediate dismissal.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth above, occurring in connection with the operations described above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that Cumberland and Beverly have engaged in unfair labor practices in violation of Section 8(a)(1) and (3) of the Act, I shall recommend that they be ordered to cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. As I have found that Beverly's only reason for failure to offer reinstatement to Connie Arbogast was because of her unlawful discharge by Cumberland, and as it is clear that but for that discharge Arbogast would have been offered employment by the successor, Beverly, I shall recommend that Beverly offer Connie Arbogast immediate and full reinstatement to her former job¹⁰ and, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or other rights and privileges, and jointly and severally with Cumberland make her whole for any loss of earnings she has suffered as a result of the discrimination against her on September 10,¹¹ until such time as successor Beverly makes an offer of reinstatement to Connie Arbogast, with interest thereon, computed in accordance with *F. W. Woolworth Company*, 90 NLRB 289 (1950), and *Florida Steel Corporation*, 231 NLRB 651 (1977).

1. Beverly Enterprises, Inc. t/a Cumberland Nursing & Convalescent Center is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Cumberland Nursing & Convalescent Center is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

3. Beverly Enterprises, Inc. t/a Cumberland Nursing & Convalescent Center is a successor to Cumberland Nursing & Convalescent Center.

4. By informing employee Steckman that Beverly knew that Steckman was one of the main instigators in getting the Union into the nursing home, Beverly violated Section 8(a)(1) of the Act.

5. By informing employee Steckman that if she was caught doing anything that had to do with the Union she would immediately be asked to leave Beverly's premises, Beverly has violated Section 8(a)(1) of the Act.

6. By discriminatorily disciplining employee Steckman by reprimanding her because of her union activities, Beverly has engaged in conduct violative of Section 8(a)(1) and (3) of the Act.

¹⁰ *Southeastern Envelope Co., Inc.*, *supra*, and cases cited therein.

¹¹ In *Abilities and Goodwill, Inc.*, 241 NLRB 27 (1979), the Board decided that unlawfully discharged strikers will be treated the same as unlawfully discharged employees for backpay purposes and, therefore, an unlawfully discharged striker no longer has to apply for reinstatement to trigger a backpay obligation. It makes no difference whether it is an economic striker or unfair labor practice striker as suggested by the General Counsel.

7. By discriminatorily discharging employee Connie Arbogast on September 10 because of her union activities, Cumberland violated Section 8(a)(1) and (3) of the Act.

8. By failing and refusing to reinstate Connie Arbogast in December 1980 because of her discharge by Cumberland on September 10, 1980, Beverly has engaged in violations of Section 8(a)(1) and (3) of the Act.

The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act. Cumberland and Beverly have not engaged in any unfair labor practices other than those specifically found herein.

Upon the foregoing findings of fact, conclusions of law, and the entire record in this matter, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER¹²

The Respondent, Beverly Enterprises, Inc. t/a Cumberland Nursing & Convalescent Center, Cumberland, Maryland, as the successor employer to Cumberland Nursing & Convalescent Center, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Creating an impression of surveillance by informing its employees that it is aware of its employees' union activities.

(b) Informing its employees that, if they are caught doing anything that has to do with the Union or any other labor organization, they will immediately be asked to leave the nursing home.

(c) Discouraging membership in the Union, or any other labor organization, by discriminatorily discharging, refusing to reinstate, issuing warning notices, or in any other manner discriminating against any employee in regard to tenure or any other term or condition of employment because of their activities on behalf of the Union or any other labor organization.

(d) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights to join or assist the Union or any other labor organization or otherwise engage in activities protected by the Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Expunge from any of its files the warning notices discriminatorily issued to Kathy Steckman on December 17, 1980, if that notice still exists.

(b) Offer immediate and full reinstatement to Connie Arbogast to her former, or substantially equivalent position, without prejudice to her seniority or other rights and privileges previously enjoyed, and jointly and severally with Cumberland Nursing & Convalescent Center make her whole for any loss of pay she may have suf-

¹² In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

ferred by reason of the discrimination against her in the matter set forth in the remedy portion of this Decision.

(c) Preserve and, upon request, make available to the Board or its agents all records necessary to determine the amounts of backpay due under this recommended Order.

(d) Post at its nursing home in Cumberland, Maryland, copies of the attached notice marked "Appendix."¹³ Copies of said notice, on forms provided by the Regional Director for Region 5, after being duly signed by Beverly's authorized representative, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(f) Notify said Regional Director, in writing, within 20 days from the date of this Order, what steps Beverly has taken to comply herewith.

IT IS ALSO ORDERED that the complaint be dismissed insofar as it alleges violations of the Act not specifically found herein.

¹³ In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT create an impression of surveillance of our employees by informing them that we are aware of their union activities.

WE WILL NOT inform our employees that if they are caught doing anything that has to do with the Union, or any other labor organization, that they will immediately be asked to leave the nursing home.

WE WILL NOT discourage membership in Retail Store Employees Union, Local 692, United Food and Commercial Workers International Union, AFL-CIO, CLC (herein Union), or any other labor organization, by discriminatorily discharging, refusing to reinstate, or issuing warning notices, or in any other manner discriminate against any employee in regard to tenure or any other term or condition of employment because of their activities on behalf of the Union, or any other labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights to join or assist the Union, or any other labor organization, or otherwise engage in activities protected by the Act.

WE WILL expunge from any of our files the warning notice discriminatorily issued to Kathy Steckman on December 17, 1980, if that notice still exists.

WE WILL offer immediate and full reinstatement to Connie Arbogast to her former or substantially equivalent position, without prejudice to her seniority to other rights and privileges previously enjoyed, and WE WILL jointly and severally with Cumberland Nursing & Convalescent Center make her whole for any loss of pay she may have suffered by reason of the discrimination against her, with interest.

BEVERLY ENTERPRISES, INC. T/A CUMBERLAND NURSING & CONVALESCENT CENTER